United Mine Workers of America, District 2 *and* Jeddo Coal Company

United Mine Workers of America, Local 803 *and* Jeddo Coal Company. Cases 4–CC–2204 and 4–CC–2217

July 20, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On February 3, 1999, Administrative Law Judge Margaret M. Kern issued the attached decision. Respondent United Mine Workers of America, District 2 (District 2) filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and a supporting brief. Respondent District 2 and the General Counsel also filed briefs in support of certain portions of the judge's decision.

The National Labor Relations Board has delegated its authority in the proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings and conclusions[1] and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, United Mine Workers of America, District 2, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(c) of the recommended Order.
2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT in any manner engage in, induce, or encourage individuals employed by Citistores, Inc., Security Savings Association of Hazleton, Reading Blue Mountain Railroad, No. 1 Contracting Corporation, Anthraco, Inc., Anthraco, Ltd., or any other person engaged in commerce or in an industry affecting commerce to engage in a strike or a refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities; to perform any services where an object thereof is to force or require Citistores, Inc., Security Savings Association of Hazleton, Reading Blue Mountain Railroad, No. 1 Contracting Corporation, Anthraco, Inc., Anthraco, Ltd., or any other person to cease using, selling, handling, transporting, or otherwise dealing in the products of Jeddo Coal; or to cease doing business with Jeddo Coal.

WE WILL NOT in any manner threaten, coerce, or restrain Citistores, Inc., Security Savings Association of Hazleton, Reading Blue Mountain Railroad, No. 1 Contracting Corporation, Anthraco, Inc., Anthraco, Ltd., or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require Citistores, Inc., Security Savings Association of Hazleton, Reading Blue Mountain Railroad, No. 1 Contracting Corporation, Anthraco, Inc., Anthraco, Ltd., or any other person to cease using, selling, handling, transporting, or otherwise dealing in the products of Jeddo Coal, or to cease doing business with Jeddo Coal.

UNITED MINE WORKERS OF AMERICA, DISTRICT 2

[1] The judge concluded that Respondent District 2 was responsible, under two separate agency theories, for certain actions of Respondent United Mine Workers of America, Local 803 (Local 803). We agree. In adopting the conclusion of the judge, Member Liebman relies solely on the judge's findings that Respondent District 2 was aware of the secondary picketing and did nothing to discourage it. Member Liebman agrees with the judge that *Teamsters Local 860 (Delta Lines)*, 229 NLRB 993 (1977), is instructive as it points out steps that Respondent District 2 *could have* taken in advance to minimize the chance that Local 803 would subsequently engage in unlawful conduct. Member Liebman does not, however, suggest that Respondent District 2 was under an affirmative *obligation* to take such advance preventive steps, or that its failure to do so was itself unlawful.

Chairman Hurtgen and Member Truesdale conclude that Pagnotti Enterprises (a primary) was present at the Honeybrook jobsite. They therefore do not pass on whether Freya Land was an ally of Pagnotti. Assuming arguendo that Freya was a neutral, that would simply add another neutral at Honeybrook. (NEPCO—Northeastern Power Company—and its subcontractors were the other neutrals at Honeybrook.) The site would nonetheless be a common situs and the picketing conformed to the *Sailors Union* (*Moore Dry Dock)*, 92 NLRB 547 (1950) standards.

[2] We shall delete par. 1(c) of the judge's recommended Order. This language is not necessary to remedy the 8(b)(4)(B) violations found in this case.

Carmen P. Cialino Jr., Esq., for the General Counsel.
Michael J Healey, Esq., for the Respondent.
David Swisher, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARGARET M. KERN, Administrative Law Judge. This case was tried before me in Philadelphia, Pennsylvania, on December 9, 1998.[1] A complaint was issued in Case 4–CC–2204 on August 6 based on an unfair labor practice charge filed on July 1 by Jeddo Coal Company (Jeddo Coal) against the United Mine Workers of America, District 2 (Respondent or District 2).[2] A second complaint was issued in Case 4–CC–2217 on November 30 based on an unfair labor practice charge filed on October 20 by Jeddo Coal against the United Mine Workers of America, Local 803 (Local 803) and the complaints were consolidated. At the hearing, counsel for the General Counsel moved to sever the proceedings against Local 803, which motion was granted, and Local 803 entered into a formal settlement agreement. This decision therefore addresses the allegations in the consolidated complaint only as they relate to District 2.

FINDINGS OF FACT

I. JURISDICTION

Jeddo Coal is engaged in the mining and sale of anthracite coal at various locations in northeast Pennsylvania, including Ebervale, Pennsylvania (the Ebervale facility). Respondent admits, and I find, that Jeddo Coal is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that District 2 and Local 803 are both labor organizations within the meaning of Section 2(5) of the Act. Respondent further admits that Joseph Lupcho and Larry Romanchik are the president and financial secretary of Local 803, respectively, and that Joseph Bellas and Richard Buhl are strike captains for Local 803. Respondent admits that these four individuals are agents of Local 803 but deny that they are agents of Respondent within the meaning of Section 2(13) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. The affiliated companies of Jeddo Coal

There were three Pagnotti brothers. Joseph Pagnotti Sr. (deceased) had three children: Michelene Kennedy, Mary Rose Pagnotti, and Joseph Pagnotti Jr. Bob Pagnotti (deceased) had two children: Maryanne Eggleston and Judy Haddonfield. Louis Pagnotti Ill (retired) has five children: James, Robert, Joseph, David, and Beth Anne Brennan.

Charles Parente is the chief executive officer of Pagnotti Enterprises, Inc. Michelene Kennedy is the president and treasurer, Maryanne Eggleston is a vice president and secretary, and David Swisher is a vice president and assistant secretary. Joseph Pagnotti Jr. is the general manager. Jeddo-Highland Coal Co. (Jeddo-Highland) is an 80-percent owned subsidiary of Pagnotti Enterprises. The corporate officers of Jeddo-Highland are the same as the officers of Pagnotti Enterprises. Jeddo Coal is an 80-percent owned subsidiary of Jeddo-Highland. James Pagnotti is president, David Swisher is vice president and secretary and Michelene Kennedy is treasurer. The remaining 20 percent of Jeddo Coal is owned by a partnership made up of the children of Charles Parente (the Parente partnership). The General Counsel takes the position that Pagnotti Enterprises, Jeddo-Highland, and Jeddo Coal are allied enterprises and constitute the primary employer here (the Pagnotti primary affiliates).

Freya Land Company is a limited liability holding company with the same business address as Pagnotti Enterprises. Louis Pagnotti, Inc. owns 45 percent of Freya Land. The officers of Louis Pagnotti, Inc. are Michelene Kennedy and Maryanne Eggleston. Twenty percent of Freya Land is owned by the Parente partnership. Eighteen percent of Freya Land is owned by the Tedesco Corporation. The remaining 17 percent is owned by Swisher and members of his family. Swisher is also a manager. Freya Land has no employees. The General Counsel does not concede that Freya Land is a primary employer.

2. The primary dispute

From May 23, 1990, until May 23, 1994, Jeddo-Highland was party to an industrywide collective-bargaining agreement with the United Mine Workers of America (the International or UMWA) known as the Anthracite Wage Agreement of 1990. On December 22, 1994, Jeddo-Highland and the UMWA entered into a memorandum of agreement in which the terms and conditions of the Anthracite Wage Agreement of 1990 were continued in effect until June 30, 1995. On the expiration of the memorandum of understanding, Jeddo-Highland and the UMWA engaged in negotiations for a successor agreement. These discussions continued until November 10, 1996, when Jeddo-Highland declared that the parties were at impasse. On December 16, 1996, Jeddo-Highland implemented the terms of its final offer, which are contained in a collective-bargaining agreement known as the Anthracite Wage Agreement between Jeddo-Highland and the UMWA. This agreement is effective by its terms from December 16, 1996, to December 15, 2000. In article XXIII of this agreement, Jeddo-Highland retained the right to assign the agreement to its wholly owned subsidiary, Jeddo Coal. That assignment was made effective January 1, 1997. Since January 1, 1997, therefore, the 1996–2000 Anthracite Wage Agreement has been in effect between Jeddo Coal and the UMWA.

Unfair labor practice charges were filed with the Regional Director of Region 4, alleging that the December 16, 1996 unilateral implementation of Jeddo-Highland's final offer was

[1] All dates are in 1998 unless otherwise indicated.

[2] In connection with this case the Regional Director filed a petition for Sec. 10(l) injunctive relief in the U.S. District Court, Middle District of Pennsylvania. A hearing was held before the Honorable Thomas I. Vanaskie on August 25 and the transcript of that proceeding was made part of the record in this case by stipulation of the parties. On September 10, the court entered an order granting a temporary injunction against District 2.

violative of Section 8(a)(5). The Regional Director dismissed the charges on March 24, 1997, concluding that a good-faith impasse had been reached. The dismissal was upheld by the Office of Appeals of the General Counsel on May 16, 1997.

On March 26, the employees of Jeddo Coal went on strike. Picketing has been conducted at the Ebervale facility since that date on a daily basis 6 days per week.

B. Citistores, Inc.: Wendy's

George Hayden operates a Wendy's franchise located on Route 309 in Hazleton, Pennsylvania. Hayden and members of his immediate family own the land, the building, and the equipment, and Citistores, Inc. owns the franchise. Hayden is also the president of Hayden Electric, an electrical contractor that has performed struck work for Jeddo Coal. The parties stipulated that Citistores is a neutral employer.

On June 11, at lunchtime, Hayden observed approximately seven pickets standing on the sidewalk in front of Wendy's and walking across the driveway. He observed a picket sign that read, "Hayden Electric Unfair to UMWA."

C. The Honeybrook site

1. Background

Beltrami Enterprises, Inc. (Beltrami) owned 2000 acres of land situated along Route 309 in Audenreid, Pennsylvania, 6 miles from the Ebervale facility. Within that 2000-acre site is an area of 5 to 10 acres where Beltrami operated a breaker until 1981 with employees represented by the UMWA.[3] This smaller tract, which borders on Route 309 and is directly accessible from the roadway, is known as the Honeybrook site. A second entrance/exit to the Honeybrook site is located on Church Street. From 1981 to 1991, the Honeybrook site was idle. In 1991, Beltrami filed for bankruptcy and Pagnotti Enterprises was recognized as a secured creditor. On June 9, 1995, the bankruptcy trustee entered into a licensing agreement with Northeastern Power Company (NEPCO) in which the trustee granted to NEPCO an exclusive license to remove culm material from the Honeybrook site. The culm material removed by NEPCO is used as a fuel source at its cogeneration plant in McAdoo, Pennsylvania. In exchange for the exclusive license, NEPCO agreed to pay per ton royalties to the bankruptcy estate.

In June 1997, NEPCO subcontracted the culm removal work to Russell Postupack CuIm Corp., Inc. (Postupack CuIm). NEPCO is Postupack CuIm's only customer. Postupack CuIm removes the culm, processes it, and loads it onto trucks owned and operated by Joe Zakrewsky Trucking. Zakrewsky Trucking transports the culm to NEPCO's McAdoo facility. The employees of Postupack CuIm and Zakrewsky Trucking are not represented by the UMWA.

In November 1997, Freya Land was formed for the specific purpose of purchasing 7400 acres of real property from the Beltrami bankruptcy estate, including the Honeybrook site. Swisher testified that the separate corporation was formed for business reasons including tax and liability considerations. Freya Land does not own any property not purchased from the Beltrami estate.

On November 3, 1997, the trustee entered into two agreements with Pagnotti Enterprises, Jeddo Coal, Jeddo-Highland, and Freya Land relating to the Honeybrook site. The first was an asset purchase agreement in which Freya Land purchased the surface estate and Pagnotti Enterprises purchased the mineral and personalty estates including the culm and silt deposits atop the surface. The second was an assignment contract in which the trustee assigned the NEPCO licensing agreement to Pagnotti Enterprises, Jeddo-Highland, Jeddo Coal, and Freya Land collectively as the assignee. This assignment is presently in effect and Pagnotti Enterprises receives the tonnage royalties from NEPCO.

2. The picketing

On June 16, Russell Postupack observed approximately seven pickets at the Route 309 entrance to the Honeybrook site. Four of the pickets wore signs that read "Pagnotti/Parente Unfair to Labor, UMWA" and "Pagnotti Subcontracting Our Jobs Away, UMWA." Postupack saw Romanchik among the pickets and asked him if it were necessary to picket Postupack's operations. Romanchik responded that he was sanctioned by the International to picket, that the International was aware that he was there, and that he did in fact feel it was necessary to picket Postupack's operation. Romanchik suggested that if Postupack joined the UMWA the picketing would stop. During this conversation, the question of Postupack Culm's relationship to the Pagnotti primary affiliates was discussed. Postupack testified that he tried to convince Romanchik that he was not an agent of Pagnotti Enterprises. Romanchik questioned the presence of Joseph Pagnotti Jr. at the site and Postupack told Romanchik the reasons Pagnotti Jr. was present: to check weigh tickets, to deal with trespass issues, and to supervise the demolition of the old Beltrami breaker.

The pickets were present at the Honeybrook site for 7 hours on June 16. During the course of the day, Postupack observed the Zakrewsksy trucks being blocked by pickets as they attempted to leave the property. After the trucks left, they refused for a time to return.

On June 22, Postupack observed approximately nine pickets at the Route 309 entrance, four of whom carried signs. He also saw picket signs nailed to trees and one taped on a nearby stop sign. Bellas was seen on the picket line several times that day.

On June 23, 24, 26, July 1 and 23, and August 4, Postupack observed pickets at the Route 309 entrance. At times the pickets sat in chairs or under trees. Picket signs were sometimes held, sometimes posted on trees or a stop sign, or leaned against motor vehicles. On June 23, Postupack observed a Zakrewsky truck drive past the pickets and not enter the property. On July 23, Postupack observed Romanchik and Buhl on the picket line. On August 4 he observed Lupcho on the picket line. There was no picketing at the Honeybrook site after August 4. At no time did any of the picketing activity at the Honeybrook site take place other than at the Route 309 entrance. There was no pick-

[3] A breaker is a coal processing plant. Run of mine coal is coal in its raw state after it has been removed from the ground. The material contains coal, rock, and other impurities. It is fed into a breaker that cleans the product and produces the finished coal product which is sold.

eting activity at the Church Street entrance and neither entrance was designated as a reserved gate.

3. The presence of Joseph Pagnotti Jr. at the Honeybrook site

Joseph Pagnotti Jr. has been employed by Jeddo-Highland since he was a teenager. Prior to 1996, he served as general manager of all of Jeddo-Highland's coal mining and coal preparation operations and he regularly attended bargaining sessions on behalf of Jeddo-Highland. Presently, Pagnotti Jr. serves as the general manager of Pagnotti Enterprises. As such, he is responsible for the Freya Land properties and all activities that take place on those properties, i.e., lumbering, coal mining, culm removal, scrap iron removal, and home rentals. He also inspects the properties to ensure there are no hazards or illegal activity.

In June, July, and August, Pagnotti Jr. had occasion to be at the 2000 acre Audenreid property to inspect rental homes located on the property and to supervise the scrapping of the old Beltrami breaker. He was also specifically present at the Honeybrook site to ensure that NEPCO performed to its contract. Pagnotti Jr. testified in relevant part:

> Q. And so, NEPCO had the right to get the material from that land?
>
> A. Yes.
>
> Q. Okay. And Pagnotti had the right to derive revenue from that?
>
> A. Yes.
>
> Q. Okay. In connection with that basic relationship, what did you do?
>
> A. Well, l made sure that we were getting credited for all the trucks that left the property, all the material that left. And, I supervised the testing of the material…there's a commercial testing, an independent testing lab that NEPCO and Pagnotti use to test the material to get a BTU value and a sizing value.
>
> Q. What are you looking for there? Any particular size?
>
> A. Yeah, well, they can't what they call 'cut the product' smaller than 5 inches. So, basically, I had to make sure that they weren't rejecting anything smaller than 5 inches. And, the blending—there's two types of residual waste on the property and that's the coarse, which is a lower quality culm, and silt, which is a little bit higher quality. And I made sure that they were, we were getting a proper accounting of how much of each material, so we got a proper BTU value on the material.
>
> Q. Okay.
>
> A. And a proper tonnage also.

Pagnotti Jr. acknowledged during his testimony that he was present at the Honeybrook site on virtually a daily basis from mid-June to early August. He typically arrived at about 7 a.m. and he left at 3 p.m. In the intervening hours, he would sometimes leave the site to attend to other duties. There is no clear record testimony as to the number of hours Pagnotti Jr. spent at the Honeybrook site, although he gave an estimated range of from 0 to 10 hours each day. Postupack testified that the normal hours of operation at the site are 7 a.m. to 3:30 p.m., Monday through Friday and that during the period of the picketing Pagnotti Jr. was present most days. He further testified that Pagnotti Jr. generally arrived between 9 and 11 a.m. and was typically present in the afternoon for the last trucks. Pagnotti Jr. did not always take the same route entering and exiting the Honeybrook site. He testified that if he saw pickets on the way in on Route 309, he would sometimes leave through the second entrance/exit to avoid them. He did not believe that the pickets would necessarily have seen him leaving the facility once he entered.

D. Security Savings

Security Savings Association of Hazleton (Security Savings) is a mutual savings association with its main branch at 31 West Broad Street, Hazleton, Pennsylvania. Richard Laubach is the president and chief executive officer of Security Savings and George Hayden is on the board of directors. The parties stipulated that Security Savings is a neutral employer.

On June 29 at 9 a.m. Laubach observed six or seven pickets in front of the main entrance to the West Broad Street branch. He observed two picket signs that read, "Who's On the Board of Security Savings and Crosses United Mine Workers Picket Lines?" and "George Hayden Unfair to the United Mine Workers."

E. Reading Blue Mountain: the Port Clinton facility

Reading Blue Mountain Railroad (Reading Blue Mountain) maintains a principal office in Port Clinton, Pennsylvania (the Port Clinton facility), and provides railway services to Jeddo Coal. Alfred Luedtke is the general manager of Reading Blue Mountain. It is not in dispute that Reading Blue Mountain is a neutral employer.

Prior to the commencement of the strike, railroad employees moved railway cars to an exit siding within the Ebervale facility. The railway cars were loaded and then taken away to their delivery destination. Sometime after the strike commenced, the railroad employees refused to cross the UMWA picket line. As a result, in May, Reading Blue Mountain leased a locomotive to Jeddo Coal and Jeddo Coal employees moved the railway cars in and out of the Ebervale facility.

On July 9, Luedtke observed approximately six pickets at the entrance to the Port Clinton facility. Three of the pickets carried signs which read "RBM&N is unfair to United Mine Workers." He did not observe anyone distributing leaflets. The pickets remained at the Port Clinton facility for about 4 hours that day.

On July 11, Reading Blue Mountain sponsored an open house at the Port Clinton facility for the public to view its railroad operations and equipment. Several thousands of people attended the open house. That day, Luedtke observed approximately six pickets at the entrance to the Port Clinton facility but he did not observe the language on their picket signs. He did not observe anyone distributing leaflets.

F. The Jeanesville Site

Up until 1990, No.1 Contracting Corporation (NCC), a subsidiary of Jeddo-Highland was engaged in the mining of anthracite coal at a 37-acre site located in Jeanesville, Pennsylvania (the Jeanesville site), and its employees were represented

by Local 803. From 1990 to 1996, the mine site was dormant. In February 1996, Alvin Roman, a vice president of NCC, purchased the assets of NCC from Jeddo-Highland including the real property, the heavy equipment, and the corporate name. The transaction between Roman and Jeddo-Highland was at arm's length and an unfair labor practice charge alleging that NCC was the alter ego of Jeddo-Highland was dismissed by the Regional Director for Region 4, on September 23, 1996. Since February 1996, NCC has been engaged in the mining of anthracite coal at the Jeanesville site and its employees are represented by the United Steel Workers. None of the coal produced by NCC since 1996 has been for any of the Pagnotti primary affiliates.

The Jeanesville site is located on a State roadway and on the opposite side of the roadway, approximately 50 feet from the Jeanesville property line is land owned by Jeddo Coal. The Jeddo Coal property at one time housed a rock crushing operation, but there has been no business activity on the site for at least 10 years. In August, the land was barren and barricaded. Occasionally a Jeddo Coal employee drives by to ensure there are no trespassers.

Howard Winters is the superintendent for NCC. On August 11, Winters observed approximately eight individuals standing across the street from the Jeanesville site on the side of the State roadway abutting the Jeddo Coal property. Winters did not observe any picket signs.

On August 13, Roman observed approximately eight individuals standing at the same location, but did not observe any picket signs.

On August 18, Winters observed approximately eight individuals standing at the same location and one of the individuals was Romanchik. He saw a single picket sign leaning against the windshield of a car. He did not see all the printed language on the sign, but recalled seeing the word "Parente" on the top of the sign.

G. Anthraco and Mid Valley Coal: the Primrose Colliery

There is a 62.5-acre strip mining pit known as the Primrose Colliery located in Schuylkill County, Pennsylvania. Surrounding the strip mining pit are 500 acres owned by the Pagnotti primary affiliates. There is a gated entrance to the property beyond which is an access road which leads to the colliery three-fourths of a mile into the property. There is also a garage with a small office approximately 100 yards past the gate. Inside the office are books and records which Federal and State inspectors occasionally examine although it is not clear to whom these records belong. Pagnotti Enterprises regularly posts a security guards at the gated entrance. The guard stays near the gate or sits in the office.

Bargaining unit employees of Jeddo-Highland traditionally worked the Primrose Colliery and trucked the run of mine coal to the Ebervale facility. For economic reasons, the pit was idled in mid 1995. On or about October 8, 1997, Pagnotti Enterprises, Black Coal Corporation,[4] and Jeddo-Highland entered into a conditional sales agreement with Anthraco, Ltd. and Anthraco, Inc. (Anthraco) with respect to the Primrose Colliery. Jeddo-Highland sold the mining equipment, Pagnotti Enterprises sold the surface estate, and Black Coal sold the mineral estate to Anthraco. Of the total purchase price of approximately $2.5 to $3 million, $2 million is to be paid in cash and the balance in run of mine coal over a period of 5 years. When the full consideration is paid, an event that has not yet occurred, Anthraco will take fee title to the conveyed properties. If Anthraco defaults, the Pagnotti companies involved have the right to repossess the property. There is no common ownership or management between the Pagnotti primary affiliates and Anthraco which is owned and operated by Stephen Mazur and his sister, Evelyn Mazur.

At the same time as the conditional sales agreement was executed, Anthraco and Jeddo Coal entered into a coal purchase agreement where Jeddo Coal agreed to purchase coal product from Anthraco for a term of years. Anthraco is not, however, limited in its ability to sell run of mine coal to any other purchaser.

In or about March 1998, Anthraco began operating the Primrose Colliery with its own employees. Prior to the commencement of the strike, Anthraco delivered run of mine coal to the Ebervale facility using its own employees and driving its own trucks. Following the strike, Anthraco's drivers were unwilling to cross the Ebervale picket line and in the summer of 1998 Jeddo Coal contracted with Mid Valley Coal Sales (Mid Valley Coal) to truck the run of mine coal from the Primrose Colliery to the Ebervale facility. There is no common ownership or management between Mid Valley Coal and the Pagnotti primary affiliates.

On October 14, Daniel Kripplebauer, an employee of Jeddo-Highland, was the assigned watchman at the Primrose Colliery. He worked that day from 6 a.m. to 3 p.m. At about 7 a.m., Kripplebauer observed a car pull up to the gate and he observed Jack Petusky, a member of Local 803, and Romanchik. During the course of the day, a total of about 10 individuals came to the site in seven vehicles. The men positioned themselves and their vehicles on the opposite side of the road. A picket sign was propped on a lawn chair and another was taped to the outside of a car. A third sign was draped over a 4-foot high reflector pole on the same side of the road as the gate. Kripplebauer observed the following language on the signs: "Mazur/Pagnotti," "Unfair to UMWA," "Scabs Work Here," "Trucking by Scabs," and "Mazur/Pagnotti Strikebreakers Work Here." A second security guard, Nancy Pytak, was present at the site for several hours that day and she observed a picket sign on the reflector pole with the words, "Mazur/Pagnotti Unfair to Miners." The pickets remained from about 7 a.m. to 2:30 p.m. Except for the security guards, no other employee of the Pagnotti primary affiliates worked at the Primrose Colliery that day.

Throughout the day, Mid Valley Coal truck convoys hauled run of mine coal from the Primrose Colliery to Ebervale. The convoys entered and exited the property approximately four times.

[4] Another subsidiary of Pagnotti Enterprises.

H. Relationship Between District 2 and Local 803

1. Constitutions and bylaws

The International and the Districts of the UMWA are governed by their respective constitutions. Locals of the UMWA are governed by bylaws approved by the International. By the terms of the International's constitution (I.C.), the International is divided into districts, subdistricts, and local unions (l.C. art. 3, sec. 2). All members of the International must also be members of the district and of the local union within whose jurisdiction they are employed (l.C. art. 3, sec. 4). All full-time elected officials and appointed employees of the International, each district, and each local union are required to participate in the UMWA's organizing of the unorganized (l.C. art. 3, sec. 5) and the International has exclusive authority over organizing (I.C. art. 10, sec. 6). The officers and executive board of the district are responsible for implementing and administering all collective-bargaining agreements covering any members of the district and must ensure that those agreements are fairly applied, fully enforced, and faithfully obeyed. The district has no authority to enter into any collective agreement, or to call or sanction any strike except as authorized by the constitution or by the International (l.C. art. 9, sec. 6). Each local union elects a mine committee, a safety committee, and an organizing committee. The organizing committee is subject to the exclusive jurisdiction of the International over organizing (l.C. art. 10, sec. 6). The constitution further provides that collective bargaining is conducted jointly by the International and the district (I.C. art. 19, sec. 5). Only the International president can call or authorize a strike, but the International president must consult with the elected International district and local union officers affected (l.C. art. 19, sec. 7). No district or local union can call an authorized strike without approval of the International president (l.C. art. 19, sec. 8) and the International maintains a selective strike fund which provides benefits to striking members (l.C. art. 19, sec. 10).

District 2 encompasses all of the State of Pennsylvania, western Maryland, and a portion of northern New York. Within District 2, there are five subdistricts and 102 local unions, including Local 803. Jay Berger is one of seven elected District 2 executive board members. District 2 has its own constitution (D.C.), which incorporates, verbatim, many of the provisions of the International's constitution. Under the District 2 constitution, District 2 is charged with the responsibility to administer and enforce collective-bargaining agreements and to process grievances (D.C. art. 2, sec. 4). Identical to the mandates of the International constitution, District 2 representatives must take all necessary and appropriate measures to insure that collective-bargaining agreements are fairly applied, fully enforced, and faithfully obeyed (D.C. art. 5, sec. 3). It is charged with the identical responsibility as that of the International to secure legal protection of the right to strike and to prohibit the use of strikebreakers (D.C. art. 2, sec. 8). Every member of District 2 has the obligation to support all strikes called by the International, to observe all picket lines, and not to engage in any strikes other than those endorsed by the International (D.C. art. 12, sec. 6). District 2 has legislative, executive, and judicial authority over all members and local unions within its territorial jurisdiction (D.C. art. 3, sec. 3).

Local unions generally encompass employees at worksites within the same company. In this case, the jurisdiction of Local 803 encompasses employees employed by Jeddo Coal. The model bylaws governing Local 803 recite the identical language as appears in the International and District 2 constitutions regarding the obligation to secure legal protection of the right to strike and to prohibit the use of strikebreakers (bylaws art. 2, sec. 8), as well as the obligation to support all strikes called by the International, to observe all picket lines, and not to engage in any strikes other than those endorsed by the International (bylaws art. 15, sec.7).

2. Collective bargaining with Jeddo-Highland and Jeddo Coal

The International is the recognized exclusive bargaining agent for the employees of Jeddo Coal. Representatives from the International, district and local unions signed the Anthracite Wage Agreement of 1990. The negotiations for a successor agreement were conducted on behalf of the UMWA by a negotiating committee consisting of representatives from the International, district and local levels. The memorandum of understanding extending the terms of the 1990 agreement was executed by Carson Bruening, secretary-treasurer of District 2. The unfair labor practice charges filed in connection with the Jeddo Coal negotiations were filed by the International and District 2.

Under the terms of both the 1990 agreement as well as the 1996–2000 unilaterally implemented agreement, there is a grievance arbitration procedure that provides that the initial steps of a grievance, steps 1 and 2, are handled by members of the local union through mine committees. At step 3, the grievance is handled by an officer of District 2. Failing resolution at step 3, the parties proceed to arbitration. Swisher testified that he generally deals with Jay Berger, an executive board member of District 2, on matters pertaining to grievances, requests for information, and unemployment appeals. Pagnotti Jr. testified that as the manager of Jeddo-Highland's coal mining operations, he handled numerous grievances with representatives from both District 2 and Local 803.

3. The strike

The strike against Jeddo Coal was authorized by Cecil E. Roberts, president of the International. Prior to giving authorization, Roberts consulted with Edward Yankovich, president of District 2, and Dan Kane, a member of the District 2 executive board. Yankovich and Kane, in turn, consulted with Lupcho and Romanchik. All parties were in agreement to call a strike. On cross-examination, Yankovich testified as follows:

> Q. So, it's fair to say that—in the three constituent parts of the mine workers which you identified in the opening of your testimony, the International, the district and the local—jointly agreed to engage in a primary strike against Jeddo. Correct?
>
> A. Yes, that's a fair–yes, that's correct.

In its answer to the consolidated complaint, District 2 admitted that it "has been engaged in a labor dispute with Jeddo and

has been on strike and picketing at Jeddo since March 26, 1998. However, it is denied that is when the labor dispute began. The labor dispute with Jeddo began in May of 1994 when the last collective bargaining agreement expired." Yankovich testified that he visits the Ebervale picket site every time he is in the area although it is not clear how often that occurs. Berger testified that he goes to the Ebervale picket line once or twice a week. All of the striking employees, those picketing at Ebervale and those at other locations, are eligible and have been receiving strike benefits from the International selective strike fund.

Nine strike captains, all members of Local 803, have met every Monday to decide if they are going to picket and/or leaflet, and to determine where these activities will take place. Romanchik made the actual picketing/leafleting assignments. Representatives from District 2 and the International have not attended the strike captain meetings. Yankovich testified that the strike captains and the officers of Local 803 are autonomous in their decisionmaking regarding picketing and leafleting subject only to direction from the International.

Berger and Yankovich, both called as Respondent's witnesses, were asked about their knowledge of the presence of striking employees at the six locations in dispute in this case. They testified as follows:

Honeybrook site: Berger testified that this was the only picket site other than Ebervale at which he was ever present. He stopped by "one day" for about 10 minutes and he saw members of Local 803 sitting in chairs and on the back of a truck. He did not observe any of them walking back and forth and he did not observe anyone patrolling with picket signs. During the course of his stay, he was advised that Pagnotti Jr. was on the site. Yankovich testified that he was not aware of any activity at Honeybrook until he received a copy of the unfair labor practice charges here.

Wendy's and Security Savings: Berger testified that the first that he was aware of picketing at Wendy's and at the Savings Bank was after the fact when he was advised by Local 803 members what had occurred. He also saw newspaper articles regarding these activities and he faxed the articles to Yankovich. Berger and Yankovich discussed the picketing and they agreed that the employees could leaflet at these locations but could not picket with signs.

Yankovich testified that he told Berger that if he got the opportunity he should tell the local members that they have the right under the law to leaflet but that they should be very careful with the use of signs. Following his conversation with Yankovich, Berger spoke with officers of Local 803, although it is not clear exactly with whom he spoke or when. Berger told them simply, "no more signs at the bank and at Wendy's." He told them that if they were going to go any place to go with leaflets. Berger testified that the reason he gave this advice to the Local 803 representatives was because they were his union brothers, not because he believed that District 2 would be liable for their activities.

Yankovich testified that the first he was aware that there had been picketing at Wendy's and at the Savings Bank was when he received the faxed newspaper articles from Berger. He admitted to being concerned after reading the articles that the local members had coerced or threatened someone and he felt an obligation to make sure that the members of Local 803 did not engage in that conduct. He was also worried about their use of picket signs. Yankovich testified that the reason he was concerned was because these were his union brothers and he didn't want to see them get into trouble.

In connection with Berger's advice to the Local 803 representatives regarding leafleting, Berger testified that he was familiar with a leaflet that was drafted by a Local 803 representative setting forth the nature of the dispute between the UMWA and the Pagnotti primary affiliates. Berger acknowledged that he told the Local 803 representative to consult with the attorneys either for District 2 or the International before distributing the leaflet. According to Berger, Local 803 does not regularly retain its own attorneys.

Port Clinton facility: Berger was not asked, nor did he testify, when he first learned of activity at this facility. He did testify that he had been told that there had been leafleting at that location, although he did not state when he was told this or by whom. The first he was aware of an allegation of picketing at this site was when he received notice of the unfair labor practice charges. Yankovich testified that he was not aware of any activity at the Port Clinton facility until he received notice of the unfair labor practice charges.

Jeanesville site: Berger was not asked, nor did he testify, when he first learned of activity at this facility. He testified that it was his understanding that picketing had occurred across the street from NCC on Jeddo property, although he did not state when he was told this or by whom. Yankovich testified that he was not aware of any activity at the Jeanesville site until he received notice of the unfair labor practice charges.

Primrose Colliery: Berger was not asked any questions and gave no testimony regarding his knowledge of the activity at this location. Yankovich testified that he was not aware of any activity at Primrose until the day before he testified at the hearing.

IV. ANALYSIS

A. The Agency Issue

The initial question is whether Respondent is responsible for the conduct engaged in by Local 803 at each of the six sites. If responsibility is established, the question is then whether the conduct at each site falls within the proscriptions of Section 8(b)(4)(i) and (ii)(B).

The General Counsel advances two different theories of agency liability: first, that the constitutions, bylaws, and collective-bargaining practices of the UMWA establish an agency relationship; and second, that by managing the primary picket line at the Ebervale facility, Respondent is responsible for the acts of those individuals who engaged in unlawful picketing away from the primary site. Respondent counters that there is no evidence to establish that Respondent instigated, supported, ratified, or encouraged the secondary conduct, and that Respondent had no affirmative obligation to discipline individuals who may have engaged in unlawful secondary conduct. For the reasons set forth below, I find merit to both of the General Counsel's theories of liability.

Both the General Counsel and Respondent correctly argue that Respondent and Local 803 are distinct entities and that one is not automatically responsible for the acts of the other. *Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212 (1979); *Coronado Coal Co. v. Mine Workers*, 268 U.S. 295 (1925); *Electrical Workers (Franklin Electric Construction Co.)*, 121 NLRB 143, 146 (1958). The Act was specifically amended in 1947 to make both unions and employers subject to the ordinary common law rules of agency, and the Board has a clear statutory mandate to apply the ordinary law of agency to its proceedings. *California Saw & Knife Works*, 320 NLRB 224, 250 (1995), enfd. 133 F.3d 1012 (7th Cir. 1998). In asserting that Respondent is responsible for the alleged unlawful picketing conducted in this case, the General Counsel may not establish an agency relationship based on the mere fact of affiliation between the union entities. Rather, the General Counsel must establish under relevant theories of agency that Local 803, in conducting its picketing activities, was acting as the agent of District 2. I find that the General Counsel has satisfied this burden.

There is no factual dispute regarding the sharing of collective-bargaining responsibilities in this case among the three levels of the UMWA. The International is the recognized exclusive bargaining representative of Jeddo Coal's employees. Representatives from all three levels signed the 1990 agreement. By its constitution, the International delegated to District 2 the responsibility of implementing and administering the collective-bargaining agreement with the employer. The Local 803 mine committee handles grievances at the initial steps and District 2 handles grievances at the latter steps through arbitration. Representatives from the International, District 2, and Local 803 participated in negotiations for a successor agreement to the 1990 contract and a District 2 officer was the sole person on behalf of the UMWA to execute the December 1994 memorandum of agreement. The International and District 2 filed the unfair labor practice charges challenging the employer's unilateral implementation of its final offer. Representatives from all three levels participated in the joint decision to call a strike and to engage in picketing.

The General Counsel argues that this case falls squarely within the Board's previous determinations finding an agency relationship among the three levels of the UMWA. In *Mine Workers* (*Garland Coal Co.)*, 258 NLRB 56 (1981), affd. 727 F.2d 954 (10th Cir. 1984), the International argued that it was not bound by the acts of its subordinate bodies in the context of entering into an 8(e) agreement. The Board affirmed the administrative law judge's finding that by delegating its contractual and statutory duties to the district and local mine committee, the International created an agency. Having done that, the International could not disavow the actions of its agents. In *Mine Workers Local 17 (Joshua Industries)*, 315 NLRB 1052 (1994), affd. 85 F.3d 616 (4th Cir. 1996), the Board approved the administrative law judge's extension of the *Garland* rationale to a situation where an admission by a local officer regarding the circumstances of an employee's layoff was deemed to be binding on the district. Judge Schwartzbart wrote, with Board approval:

> While these cases do not speak directly to establishing the local union as the agent of the local's District, there appears to be no meaningful distinction that would preclude such agency application from being so extended to the Districts, as well. Under the existing shared arrangement, the local, in processing and resolving grievances at the immediate level, also acts as the agent of its parent District. [Id. at 1064.]

Finally, in *Reading Anthracite Co.*, 326 NLRB 1370 (1998), the Board found the International, District 2 (the same district involved in this case), and the local all responsible for the local's discriminatory assignment of seniority dates. The Board expressly relied on *Garland* and *Joshua Industries* and reiterated the principle that the International, as the certified representative and a signatory to the collective-bargaining agreement, could delegate the duties of contract administration but could not delegate the responsibility.

The agency relationship found in each of these cases arose in the context of collective bargaining and contract administration. In this case, the agency relationship between Respondent and Local 803 arises in the same context. Respondent and Local 803 acted jointly to administer the 1990 agreement, acted jointly to negotiate a successor agreement and acted jointly in making the determination to strike and to engage in primary picketing at the Ebervale facility. The decision to strike and to picket was a direct result of the impasse reached in negotiations and the agreed upon means by which District 2 and Local 803 sought, and continues to seek, to compel the employer to acquiesce to its demands. Since the alleged unlawful picketing occurred within the collective-bargaining context, I find that Local 803 acted as an agent of Respondent for the same reasons as those enunciated in *Garland*, *Joshua Industries,* and *Reading Anthracite*.

Nor are the Board's decisions in these cases inconsistent with the Supreme Court's decision in *Carbon Fuel* as Respondent appears to suggest. In that case, local unions of the UMWA engaged in unauthorized wildcat strikes in violation of collective-bargaining agreements. The Court concluded that the International was not liable in damages where it did not instigate, support, ratify, or encourage the wildcat strikes. In this case, all three levels of the UMWA authorized the strike to compel the employer to accede to their tripartite collective-bargaining demands. Respondent did in fact instigate, support, ratify, and encourage the strike and the primary picketing. Having established Local 803 as its agent in the context of this strike, Respondent is properly liable for the conduct engaged in by Local 803 during the strike.

The General Counsel's second theory of agency liability is premised on the Board's rule, longstanding and clear, that when a union authorizes a picket line it is required to retain control over the picketing. If a union is unwilling or unable to take the necessary steps to control its pickets, it must bear the responsibility for their misconduct. *Auto Workers Local 695 (T. B. Wood's)*, 311 NLRB 1328, 1335 (1993), citing *Boilermakers Local 696 (Kargard Co.),* 196 NLRB 645, 647–648 (1972). Where, as here, the alleged misconduct occurs away from the picket line, a union will generally not be held liable for striker misconduct unless there is a showing of knowledge of that

specific misconduct. *Teamsters Local 812 (Pepsi-Cola Newburgh)*, 304 NLRB 111 (1991). The burden is on the General Counsel to establish either that the union authorized the conduct or that the union had knowledge of the conduct and failed to disavow it and take corrective action. *Plumbers Local 195 (McCormack-Young)*, 233 NLRB 1087 (1977).

There is no dispute that Respondent authorized the picketing at the Ebervale site. Respondent admitted in its answer that it has participated in the picketing being conducted at the primary site, and at the hearing counsel for Respondent admitted that the picket line is maintained by Respondent (Tr. 181). Yankovich testified that he visits the picket line as often as possible and Berger goes to the picket line once or twice each week. Nevertheless, there is no direct evidence that Respondent authorized the picketing at the six sites away from Ebervale. The issue is therefore whether the General Counsel has proven, by a preponderance of the evidence, that Respondent had knowledge of what the Local 803 pickets were doing and thereafter failed to disavow their actions and take corrective action. I find, based on the testimony of Yankovich and Berger, that the General Counsel has satisfied this burden.

It is helpful to examine the chronology of events. The first incident of picketing away from the primary site occurred at Wendy's on June 11. Berger testified that the first he was aware of this activity was when he was told about it by members of Local 803. His testimony was deliberately vague in that he did not specify with whom he spoke or when this conversation occurred. His second source of information about the Wendy's picketing was a newspaper report of the incident which he clipped and faxed to Yankovich. Berger skirted the question of when this article appeared. Indeed, I find Berger's testimony misleading in this regard in that he lumped together his discovery of the newspaper article reporting on the Wendy's picketing which occurred on June 11 with his discovery of the newspaper article reporting on the Security Savings picketing which occurred on June 29, 18 days later. It is reasonable to infer that newspaper articles reporting on news events tend to be published at or about the time the news event occurs. I find, based on all of these facts, that Berger had to have been aware of the Wendy's picketing within a few days of June 11. The second incident of picketing occurred at the Honeybrook site beginning on June 16 and Berger admitted in his testimony that he was aware of the picketing at this site. The third incident of picketing occurred at Security Savings on June 29, and again the event was reported in the local newspaper. Berger clipped the article and faxed it to Yankovich. On July 1, an unfair labor practice charge was filed and served on Respondent alleging that Respondent, not Local 803, had violated Section 8(b)(4)(i) and (ii)(B).

The chronology establishes that by mid-June Respondent had specific knowledge that the officers and strike captains of Local 803 had embarked on a strategy of engaging in picketing at sites other than at Ebervale. Berger and Yankovich were also clearly aware of the unlawful nature of the picketing at Wendy's and Security Savings. Yankovich testified that he was concerned that the local members had "coerced or threatened" someone, a reference to the statutory terms of Section 8(b)(4). He told Berger that if he got the opportunity, he should tell the Local 803 representatives that if they were going to sites away from Ebervale, they should go with leaflets, not picket signs, again a statement which evidences some understanding of the difference between picketing and leafleting and how those two activities are treated under Section 8(b)(4). Berger testified that he passed along this information in the form of friendly advice from one union brother to another. This was the sum total of the action taken by Respondent in response to its knowledge of picketing activity at secondary sites. Indeed, Yankovich testified that he felt District 2 was without authority to tell Local 803 anything at all about its picketing activities as he viewed the strike captains as completely autonomous, subject only to direction from the International. Yankovich did not, however, express his concerns about Local 803's activities to anyone at the International.

After receiving Berger's advice, the strike captains continued to meet every Monday and determined to conduct picketing at three more locations: Port Clinton, Jeanesville, and the Primrose Colliery. Respondent made no effort to attend the strike captain meetings and gave no instructions or directives. The picketing at Jeanesville and Primrose occurred after the issuance of the first complaint in this case which named District 2 as the sole respondent, and still Respondent did not take corrective action.

The facts of this case stand in stark contrast to the situation considered by the Board in *Teamsters Local 860 (Delta Lines)*, 229 NLRB 993 (1977). In that case, the international union issued specific written instructions to its pickets designed to prevent unlawful secondary conduct. In addition, union representatives attended a meeting of striking employees and gave oral instructions reinforcing the written instructions. When the striking employees thereafter engaged in 8(b)(4) conduct, the Board concluded that the international could not be held liable as it had done all that it reasonably could have done to prevent the misconduct. *Delta Lines* is instructive as it points out all that Respondent could have done in this case and didn't. Respondent was lulled to inaction by its mistaken assumption that it was not responsible for the conduct of Local 803 and by its mistaken belief that Local 803 was autonomous in its picketing activities. These self-serving errors do not exculpate Respondent from liability. Respondent was obligated to make a "conscientious serious attempt" to curtail the conduct of the strike captains which grew out of, and was closely associated with, the strike and picketing at Ebervale. *Meat Cutters Local 248 (Milwaukee Independent Meat Packers Assn.)*, 222 NLRB 1023 (1976). It failed to do so and must therefore be held responsible, under this second theory of agency liability, for that picketing which is determined to violate Section 8(b)(4).

B. The Neutrals to the Dispute

The General Counsel takes the position, not disputed by Respondent, that Pagnotti Enterprises, Jeddo-Highland, and Jeddo Coal constitute the primary employer in this case and that Hayden Electric was a struck work ally. The General Counsel does not concede, however, that Freya Land is an ally of the primary. I disagree.

In assessing whether an employer is neutral or not, the Board and the courts have developed the ally doctrine which has two

branches. One involves the employer whose neutrality is alleged to be compromised by the performance of struck work, that is, work that would have been performed by the primary's employees but for the strike at the primary employer's facility. *Teamsters Local 776 (Pennsy Supply),* 313 NLRB 1148, 1168 (1994); *Teamsters Local 959 (Odom Corp.)*, 286 NLRB 834 (1983). The other involves an employer who is claimed to be so closely related to the primary employer that the two constitute a single employer or single enterprise. In determining whether two entities constitute a single employer, the Board considers four factors: (1) common ownership; (2) common management; (3) interrelation of operations; and (4) common or centralized control of labor relations. *Mine Workers (Boich Mining),* 301 NLRB 872 (1991), enf. denied 955 F.2d 431 (6th Cir. 1992). None of the individual factors determining neutrality is considered in isolation, rather the Board weighs all of them to determine whether in fact one employer is involved in or is wholly unconcerned with the labor disputes of the other. *Teamsters Local 560 (Curtin Matheson),* 248 NLRB 1212 (1980).

Over 80 percent of the ownership of Freya Land is in the hands of the Pagnotti, Parente and Swisher families, the same families who own and are officers of Pagnotti Enterprises, Jeddo-Highland and Jeddo Coal. Freya Land was created for the sole purpose of acquiring real property for the benefit of the Pagnotti affiliates. Contractual relationships were entered into by all four companies for a common purpose. The management of Freya Land is in the hands of David Swisher and Joseph Pagnotti Jr. Thus, there is evidence of common ownership, common management, and interrelation of operations between the Pagnotti primary affiliates and Freya Land. Although there is no evidence of common control of labor relations, I find that fact to be of little significance since Freya Land has no employees. I therefore find that Freya Land is an ally of the Pagnotti primary affiliates under the single enterprise criteria.

The parties stipulated, and I find, that NEPCO, Zakrewsky Trucking, Reading Blue Mountain, Security Savings, and Citistores are all neutrals to the dispute between the UMWA and the Pagnotti primary affiliates.

C. Wendy's and the Security Savings

The evidence establishes that neither the primary nor Hayden Electric, the struck work ally of the primary, was present or conducting business at Wendy's or at Security Savings at the time of the picketing. These were purely secondary sites and the picketing which took place there was plainly unlawful. Respondent concedes this point in its brief. I therefore find that Respondent violated Section 8(b)(4)(i) and (ii)(B) of the Act on June 11 and 29 by engaging in picketing at these locations.

D. Reading Blue Mountain

On July 9, six individuals stood at the entrance to the Port Clinton facility, three of them carrying picket signs. There is no evidence that leaflets were distributed on this or any other day at Port Clinton. On July 11, six individuals with pickets signs again stood at the entrance to the facility. The primary was not present nor conducting business at Port Clinton at the times of the picketing and it was a purely secondary site. Respondent defends this activity on the grounds that there is no evidence of patrolling either with or without signs, and therefore there was no picketing or any other conduct that violated Section 8(b)(4)(i) and (ii)(B). Respondent's argument is without merit.

Individuals patrolling and carrying placards attached to sticks constitute the classic form of picketing involved in alleged secondary boycott cases. However, neither patrolling alone nor patrolling combined with the carrying of placards are essential elements to a finding of picketing; rather, the essential feature of picketing is the posting of individuals at entrances to a place of work. The Board and courts have also recognized the concept of "signal picketing" which, as with actual picketing, concerns conduct operating as a signal to induce action by those to whom the signal is given. Such cases typically involve the stationing of union business agents near an entrance to a jobsite or the placing of placards near an entrance—positioned so that anyone approaching can read the printed message. *Service Employees Local 87 (Trinity Maintenance),* 312 NLRB 715, 743 (1993), and cases cited there.

I find, based on the foregoing principles, that by stationing six individuals with picket signs at the entrance to the Port Clinton facility on July 9 and 11, Respondent engaged in picketing which violated Section 8(b)(4)(i) and (ii)(B) of the Act.

E. The Jeanesville, Primrose, and Honeybrook Sites

1. Applicable principles of law

In applying the secondary boycott provisions of the Act, the Board must balance the interests of unions in picketing at the sites of their disputes against the interests of secondary employers to be free from picketing arising out of controversies in which they are not directly involved. The legality of the picketing at these three sites involves application of the same principles. In each case, the threshold issue is whether the situs of the picketing is a common situs or a purely secondary situs. Resolution of this issue turns on whether or not the primary, the Pagnotti primary affiliates, was present and engaged in normal business operations at each site.

It bears repeating that the Ebervale facility is the undisputed primary situs where the primary owns the coal lands and is engaged in the mining and sale of anthracite coal utilizing bargaining unit employees. In contrast, the primary is present at the three disputed sites to varying lesser degrees. At Jeanesville, the sole evidence of the primary's presence is its ownership of the property, nothing more. It is not engaged in any business operation and no employees are present. At the Primrose Colliery site, the primary owns the land but is not engaged in any business operation. A security guard is the only employee present. At the Honeybrook site, the primary owns the land, the mineral deposits and the surface culm deposits, and sells the surface deposits to a neutral employer with whom it has a contractual relationship. A manager of the primary is present but no employees are present.

The concept of a primary's "presence" at a site is a related but distinct concept from whether it is engaged in its normal business operation at a site. *Cleveland Building & Trades Council (Aetos Construction),* 297 NLRB 407, 415 (1989). For if a primary employer is deemed not even to be present at a particular location, then picketing at that location is purely

secondary. *Carpenters (Gulf Coast Construction)*, 248 NLRB 802 (1980); *Los Angeles Building Trades Council (Silver View Associates)*, 216 NLRB 307 (1975); *Steelworkers Local 6991 (Auburndale Freezer)*, 177 NLRB 791 (1969), vacated 434 F.2d 1219 (5th Cir. 1970), on remand 191 NLRB 1 (1971). If, on the other hand, the primary employer is present and conducting its normal business at the site together with other neutral employers, the site becomes a common situs and picketing is judged under the *Sailors Union* (*Moore Dry Dock)* criteria.[5] Two or more employers performing separate tasks on common premises constitute a common situs. *Electrical Workers v. NLRB (General Electric),* 366 U.S. 667, 676–677 (1961); *Electrical Workers Local 323 (Indian River Electric)*, 206 NLRB 377 (1973). If the common situs is owned and operated by the primary, the conduct may also be judged under the Supreme Court's *General Electric/Carrier* doctrine. *General Electric,* supra*; Steelworkers v. NLRB (Carrier Corp.),* 376 U.S. 492 (1964); *Oil Workers Local 1-591 (Burlington Northern Railroad)*, 325 NLRB 324 (1998).

2. The Jeanesville site

The General Counsel argues that by virtue of the contiguity of the Jeddo property with the NCC property, the Jeanesville site is a common situs. I disagree. For a common situs to exist, both the primary and the neutral must, at some point in time, occupy the same premises and perform tasks. *General Electric,* supra. Since the primary has no business operation of any kind on its property, the two properties together cannot be considered a common situs. The Jeanesville site was therefore a purely secondary site and the picketing conducted there was, a fortiori, secondary. The pickets could only have been directing their appeal to NCC and its employees as there was no one else present.

Respondent suggests through the testimony of Berger that the picketing was lawful because the pickets stood on land owned by the primary. This fact alone, however, is not dispositive of the issue of whether the picketing was secondary in nature. The Supreme Court has repeatedly stated that the location of picketing is an important but not a controlling factor. *General Electric,* supra*; Carrier Corp.,* supra. By standing 50 feet from the entrance to NCC, the members of Local 803 were engaged in signal picketing, intending to induce action by NCC and its employees.

The evidence establishes that on August 11 and 13, eight members of Local 803 stood across the street from the entrance of the Jeanesville site without picket signs, and on August 18, eight members displayed a single picket sign. Respondent contends that none of this activity constitutes picketing. Respondent's argument is without merit and I find that on each of the three days that Local 803 members were present at the Jeanesville site, they were engaged in picketing as that term is defined. *Trinity Maintenance,* supra. I further find that this conduct violated Section 8(b)(4)(i) and (ii)(B) of the Act.

3. The Primrose site

With respect to the Primrose site, the General Counsel contends that the primary has no presence at this site and that it is therefore a purely secondary site. I agree. At the Primrose site, the primary owns the land and assigns a single employee to the site to secure the premises against trespassers. Within the property a neutral third party, Anthraco, operates a strip mining business. The primary, on the other hand, does not conduct any business on the property. It is therefore not a common situs, but rather a purely secondary situs. As in the case of the Jeanesville site, the pickets could only have been directing their appeal to Anthraco and its employees as there was no one else present.

Nor does the fact that the primary owned the property upon which Anthraco was conducting its business of any moment. The legality of picketing does not depend on title to property. *Retail Clerks Local 1017 (Crystal Palace Market),* 116 NLRB 856 (1956), enfd. 249 F.2d 591 (9th Cir. 1957). The impact of the picketing on Anthraco was no less because the primary was the owner of the premises.

Respondent defends its activity on October 14 on two grounds: first, that the work performed by Anthraco was related to the primary's normal operations and that the picketing was therefore primary activity under the work-related test; and second, that Anthraco was a struck work ally. I reject both of these arguments.

With respect to the applicability of the work-related test, Respondent ignores the essential factual premise of the Supreme Court's decisions in *General Electric* and *Carrier:* the existence of a common situs. Where premises are owned and operated by a primary employer, the Board and courts will look to the nature of the duties being performed on those premises by a secondary's employees. If their duties are connected with the normal operations of the primary employer, picketing directed at them is protected primary activity. If, however, their work is unrelated to the day-to-day operation of the primary employer, the picketing is secondary and unlawful. *Burlington Northern Railroad,* supra. In this case, the Primrose site was not a common situs for the reasons previously discussed, and Respondent's reliance on the work-related test is misplaced.

With respect to the struck work ally defense, I find Respondent has presented no evidence to support that affirmative defense vis-à-vis Anthraco. The conditional sales agreement and the coal purchasing agreement entered into between the primary and Anthraco were executed more than 5 months before the commencement of the strike and there is absolutely no evidence that these agreements were entered into in anticipation of the strike. The deliveries of run of mine coal to the primary commenced prior to, not after, the strike. While it is true that bargaining unit employees operated the mine prior to mid-1995, it cannot reasonably be argued that when the mine was sold more than 2 years later, the sale constituted a transfer of struck

[5] There are four criteria by which to measure the presumptive lawfulness of picketing in common situs situations. Such picketing is presumptively lawful if: (a) the picketing is strictly limited to times when the situs of the dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the situs; (c) the picketing is limited to places reasonably close to the location of the situs; and (d) the picketing discloses clearly that the dispute is with the primary employer. *Sailors Union (Moore Dry Dock)*, 92 NLRB 547, 549 (1950). The criteria are not to be applied on an indiscriminate per se basis, but are aids in determining the underlying question of statutory violation. *Electrical Workers Local 861 (Plauche Electric),* 135 NLRB 250, 255 (1962).

work. In addition, Swisher's uncontradicted testimony was that the Pagnotti primary affiliates had an established practice of purchasing run of mine coal from outside sources and transporting it to the Ebervale facility to be processed. An employer does not forfeit its neutral status by continuing business dealings with the struck employer in the same manner and to the same extent as it did before the strike. *Pennsy Supply,* supra at 1168. For all of these reasons, I find that Respondent's defense with respect to Anthraco is wholly without merit.

Nor do I find Mid Valley Coal Sales to be an ally of the primary. According to the terms of the 1996–2000 collective-bargaining agreement, the transportation of run of mine coal purchased from bona fide third party sellers to Ebervale is expressly excluded from the classified work jurisdiction of the UMWA. Since the work done by Mid Valley Coal is not work that would have been performed by the primary's employees, it is not struck work.

4. The Honeybrook site

Turning to the Honeybrook site, the threshold issue is again whether this is a common situs. The Pagnotti primary affiliates and their ally, Freya Land, own the land and the culm and silt deposits. The deposits are income producing assets which the primary sells. By operation of the exclusive lease between the primary and NEPCO, NEPCO's subcontractor Postupack Culm, and Postupack Culm's subcontractor Zakrewsky Trucking, enter the property on a daily basis to process and remove these materials. The testimony of Pagnotti Jr. very clearly set out the basic relationship: NEPCO has the right to get material and Pagnotti Enterprises has the right to derive revenue. I conclude that these facts establish that the primary is engaged in normal business operations at the Honeybrook site and that it is a common situs.[6]

The General Counsel argues that the primary has no business operation at Honeybrook because it has never had employees working there, and relies on the Board's decision in *Los Angeles Building Trades Council (Silver View Associates)*, 216 NLRB 307 (1975). In that case, the primary was engaged as an owner-builder in the building and construction industry. The Board found that the primary was engaged in its normal business only at its office, not at the picketed construction site where it had no employees or supervisors and work was being performed only by subcontractors. The General Counsel's reliance on *Silver View Associates* is misplaced because he misapprehends the nature of the primary's business here. By way of illustration, had the Pagnotti primary affiliates hired its own employees to load NEPCO's trucks as they arrived at the Honeybrook site, there would be no question that it was engaged in a business operation. In this case the primary is able to conduct its business without using its own employees because NEPCO, though subcontractors, utilizes its own trucks and its own employees to perform the loading work. This method of operation does not, in my view, change the fundamental nature of the business of the primary. It is still engaged in the business of selling culm, albeit without the need for its own employees to perform work. Indeed the Board has recognized that the absence of employees does not furnish a per se basis for finding that an employer is not engaged in its normal business at a common situs. *Electrical Workers Local 25 (Eugene Iovine)*, 201 NLRB 531 (1973). Moreover, the General Counsel's reliance on *Silver View* also ignores an essential distinguishing fact. In this case, the general manager of Pagnotti Enterprises was at the site on an almost daily basis to supervise the operation.

Having thus determined that the primary owns and operates a business at Honeybrook, and that it was a common situs at all times material here, the nature of the picketing is properly examined under the *Moore Dry Dock* criteria. I find that the primary was at all times present at the site and engaged in its normal business. In the absence of a reserved gate, the picketing which took place at the main entrance to the premises was conducted reasonably close to the location of the situs and the picket signs clearly indicated that the UMWA's dispute was with the Pagnotti primary affiliates and no one else. Inasmuch as the *Moore Dry Dock* criteria was met, and there is no other evidence that the picketing was conducted for an unlawful object, I conclude that the picketing at the Honeybrook site was at all times lawful.[7]

CONCLUSIONS OF LAW

1. Jeddo Coal Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Pagnotti Enterprises, Inc., Jeddo-Highland Coal Co., Freya Land Company, Reading Blue Mountain Railroad, Security Savings Association of Hazleton, Citistores, Inc., Northeastern Power Company, Russell Postupack Culm Corp., Joe Zakrewsky Trucking, No. 1 Contracting Corporation, Anthraco, Inc., Anthraco Ltd., and Mid Valley Coal Sales are each a person within the meaning of Section 2(1) of the Act.

3. Respondent United Mine Workers of America, District 2 is a labor organization within the meaning of Section 2(5) of the Act.

4. United Mine Workers of America, Local 803 is a labor organization within the meaning of Section 2(5) of the Act.

5. Respondent violated Section 8(b)(4)(i) and (ii)(B) on June 11, 1998, by picketing Citistores, Inc. at its Wendy's franchise location in Hazleton, Pennsylvania, with an object of forcing or

[6] The exclusivity of the lease with NEPCO does not dictate a different result. This is not a situation where the primary leases the property to NEPCO and receives periodic lease payments for NEPCO's possession and use of the property. The lease in this case is an contract where NEPCO has permission to enter the property and remove the culm in return for which it must pay the primary the contractually determined purchase price.

[7] In view of my finding that the primary was at all times present and engaged in business operations at the Honeybrook site, I need only briefly address the General Counsel's alternative theory that the primary was only engaged in business during those times when Pagnotti Jr. was physically present. Even if I were to accept this theory, I would find that Pagnotti Jr. was present on an almost daily basis and there was no set pattern by which the pickets could have known when he was away from the site. Indeed, the evidence establishes that Pagnotti Jr. purposely used alternating entrances/exits to avoid having to pass the pickets. The evidence is insufficient to establish that Pagnotti Jr. was absent from the site at the times when the picketing was conducted.

requiring Citistores, Inc. to cease using, selling, handling, transporting, or otherwise dealing in the products of Jeddo Coal and to cease doing business with Jeddo Coal.

6. Respondent violated Section 8(b)(4)(i) and (ii)(B) on June 29, 1998, by picketing at Security Savings Association of Hazleton with an object of forcing or requiring Security Savings Association of Hazleton to cease using, selling, handling, transporting, or otherwise dealing in the products of Jeddo Coal and to cease doing business with Jeddo Coal.

7. Respondent violated Section 8(b)(4)(i) and (ii)(B) on July 9 and 11, 1998, by picketing at Reading Blue Mountain Railroad in Port Clinton, Pennsylvania, with an object of forcing or requiring Reading Blue Mountain Railroad to cease using, selling, handling, transporting, or otherwise dealing in the products of Jeddo Coal and to cease doing business with Jeddo Coal.

8. Respondent violated Section 8(b)(4)(i) and (ii)(B) on August 11, 13, and 18, 1998, by picketing No.1 Contracting Corporation in Jeanesville, Pennsylvania, with an object of forcing or requiring No. 1 Contracting Corporation to cease using, selling, handling, transporting, or otherwise dealing in the products of Jeddo Coal and to cease doing business with Jeddo Coal.

9. Respondent violated Section 8(b)(4)(i) and (ii)(B) on October 14, 1998, by picketing Anthraco, Inc., and Anthraco, Ltd. in Schuylkill County, Pennsylvania, with an object of forcing or requiring Anthraco, Inc. and Anthraco, Ltd. to cease using, selling, handling, transporting, or otherwise dealing in the products of Jeddo Coal and to cease doing business with Jeddo Coal.

10. Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(i) and (ii)(B) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, United Mine Workers of America, District 2, its officers, agents, and representatives, shall

1. Cease and desist from

(a) In any manner engaging in, inducing, or encouraging individuals employed by Citistores, Inc., Security Savings Association of Hazleton, Reading Blue Mountain Railroad, No.1 Contracting Corporation, Anthraco, Inc., Anthraco, Ltd., or any other person engaged in commerce or in an industry affecting commerce to engage in a strike or a refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle, or work on any goods, articles, materials, or commodities or to perform any services where an object thereof is to force or require Citistores, Inc., Security Savings Association of Hazleton, Reading Blue Mountain Railroad, No.1 Contracting Corporation, Anthraco, Inc., Anthraco, Ltd., or any other person to cease using, selling, handling, transporting, or otherwise dealing in the products of Jeddo Coal, or to cease doing business with Jeddo Coal.

(b) In any manner threatening, coercing, or restraining Citistores, Inc., Security Savings Association of Hazleton, Reading Blue Mountain Railroad, No.1 Contracting Corporation, Anthraco, Inc., Anthraco, Ltd., or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require Citistores, Inc., Security Savings Association of Hazleton, Reading Blue Mountain Railroad, No. 1 Contracting Corporation, Anthraco, Inc., Anthraco, Ltd., or any other person to cease using, selling, handling, transporting, or otherwise dealing in the products of Jeddo Coal, or to cease doing business with Jeddo Coal.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its business offices and all meeting halls within its geographic jurisdiction copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Sign and return to the Regional Director sufficient copies of the notice for posting by Jeddo Coal Company, Pagnotti Enterprises, Inc., Jeddo-Highland Coal Co., Freya Land Company, Reading Blue Mountain Railroad, Security Savings Association of Hazleton, Citistores, Inc., No. 1 Contracting Corporation, Anthraco, Inc., and Anthraco Ltd., if willing, at all places where notices to employees are customarily posted.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."